# THE TRIPARTITE DIVISION OF TORTS.

THE essay in this REVIEW (May, 1894), by Mr. Justice HOLMES, on "Privilege, Malice, and Intent," raises a broad question as to the general analysis of a Tort, which it is the purpose of this article to discuss. The writer has for some time believed in the correctness of the division there briefly expounded as a foundation for the discussion of Malice in connection with Interference with Social Relations, and the general interest shown in the suggestions of that learned writer seems to show that the time is favorable for a presentation of the analysis in its broader aspect as a general foundation for the treatment of all Torts. Certainly the subject is in need of some accepted analysis, which shall at once co-ordinate our present knowledge and form the basis of future development. If we are ever to have, as Sir Frederick Pollock puts it, not books about specific Torts, but books about Tort in general, some further examination of fundamental ideas is desirable.

One might proceed with such a general analysis without regard to the definition of a Tort, or — what is much the same thing — without setting forth one's view as to the differentiation of Tort-relations from others in the general classification of private law. But, for the sake of clearness, the latter task will here be briefly attempted, no effort being made to justify the system stated, or to say more than is necessary as preliminary to the main subject.

Private law, then, deals with the relations between members of the community regarded as being ultimately enforceable by the political power. Such a single relation may be termed a Nexus; it has a double aspect, for it is a Right at one end, and a Duty or Obligation at the other; every such relation or Nexus necessarily having both these aspects. In classifying them, we may of course rest the division on the nature of either the Rights involved or the Duties involved. For the first and broadest division it seems best to take the latter point of view, and to distinguish according as the Duty has inhered in the Obligor (1) without reference to his wish or assent, or (2) in consequence of some volition or intention of his to be clothed with it. The former we may term Irrecusable, — having reference to the immateriality of the attitude of the obligor in respect to consent or refusal; the latter,

Recusable, — for the same reason. The latter sort includes Contracts (in the narrow sense), and some few varieties not here important. The former includes Torts (so called), Enrichment (a part of Quasi-Contracts as now treated), and a few minor ones. The permanent justification for this division, it may be said, will be found in the deep-rooted instinct of the Anglo-American legal spirit, which is strikingly backward in imposing or enlarging an irrecusable nexus, but gives the freest scope for the voluntary assumption (Recusable) of nexus of any content.[1] Dividing further the former sort, we find (*a*) many imposed universally, *i. e.* on all other members of the community in favor of myself; and (*b*) a few imposed on particular classes of persons by reason of special circumstances. Of the latter sort the duty of a child to support a parent, as recognized in Continental and other law, is an example; but the most important group is found in parts at least of the subject known in Roman law as *Quasi-Contract*, in modern French and German jurisprudence as *enrichissement indu* and *Bereicherung*, and with us to-day as Quasi-Contract. As the feature which distinguishes this sort (*b*) from the former (*a*) is that the nexus is imposed in the one case on all persons whatever, but in the other on those particular persons only of whom special facts are true, the natural terms of distinction are, for the one, Universal Irrecusable Nexus; for the other, Particular Irrecusable Nexus. The subject of Tort, then, deals with the large group of relations here termed Universal Irrecusable Nexus. But the failure of the reader to accept the analysis thus briefly set forth need not prejudice the validity of what is now to be said, for it has been given only that the scope of the relations included by the writer under Torts may not be misunderstood.

The next question is, What is the content of the rights and duties included under this head? Here, of course, we get nothing from mere analysis; we must look to judicial practice and legislation, as embodying the established results of the community's sense of systematic justice. We have seen, however, that the starting-point of the analysis is the tendency of Anglo-American peoples to

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[1] Compare Holmes, "Common Law," 77: "The liabilities . . . arising from a tort are independent of any previous consent of the wrongdoer to bear the loss occasioned by his act. . . . He does a harm which he has never consented to bear, and if the law makes him pay for it, the reason for so doing must be found in some general view of the conduct which every one may fairly expect and demand from every other, whether that other has agreed to it or not."

be chary about imposing irrecusable duties, especially when universal. The general character, then, of these nexus will be that of relations fundamentally necessary to civilized social intercourse, — the minimum number of universal nexus without which (having reference to the points of view of both obligee and obligor) the community cannot get along. This in fact fairly expresses the general character of Tort-rights. Furthermore, and as a result of the same spirit, these Universal Irrecusable Nexus are all negative, not affirmative; *i. e.* the line is drawn at requiring others not to be the means of harm to me; our law has not yet gone so far, in Universal duties, as to impose any affirmative duty, as between one man and another, to take action to confer a good.

But, going further than these general features, we easily see, on examination, certain generic component elements in every relation of the sort we are considering. *First*, there are the specified sorts of harm which the obligor has a claim to be free from; this is the basis of the obligee's interest, the thing for the sake of which the nexus is instituted. *Second*, there must be something to connect the obligor with this harm, — that is, we must specify what is the sort of causality-connection, or the like, between the obligor and the harm in question for which he will be held responsible. This is necessary, because the very nature of the nexus presupposes that the obligor is to have some connection with the harm, and it is part of our business to specify when that connection shall be deemed to exist. *Third*, since human experience has always found it necessary to sanction in law the principle of give-and-take, and to compel us sometimes to put up with harm whose source is perfectly clear, there are numerous classes of circumstances to be specified in which the nexus fails, and is without application, — that is, although harm is done, and although there is no question as to a particular person's responsibility for it. These circumstances form limitations to the nexus as a whole.

There are, therefore, three distinct classes of limitations dealt with in the law relating to Torts, which may be conveniently termed the Primary, Secondary, and Tertiary limitations. The first class deals with the sort of harm to be recognized as the basis of the right; this may be called the Damage element. The second class deals with the circumstances fixing the connection of the obligor with this forbidden harm; this we may call the Responsibility element. The third class deals with the circumstances in which, assuming both the Damage and the Responsibility elements to be

present, the nexus still has no validity, — in other words, the considerations which allow the harm to be inflicted with impunity; this we may term the Excuse or Justification element. This analysis results in a tripartite division of the Tort-nexus.

We may now examine this division in detail with reference to the various topics dealt with in our law. No attempt will here be made (though a later occasion may be taken for this) to establish any further subdivisions within these three great groups. The object here is merely to illustrate and justify the above analysis by pointing out the place occupied within the above groups by the main topics recognized as belonging to the subject.[1]

I. *The Damage Element.* — The question is here, what sorts of harm is it that the law recognizes as the subject of a claim for its protection? We have here nothing to do with the question, Who is responsible? or, Is X responsible? nor with the question, Is X, though responsible, here excusable? We may and do determine the limitations of the Damage element without regard to these questions. Of course, after determining that the one exists, we may then determine that the other does not; and cases are frequent in which two or even all of the questions are disputable, and must be settled before a final determination can be reached as to the existence of a claim, *i. e.* a nexus. But, whenever there is a decision upon the Secondary or the Tertiary limitations, it necessarily involves, by assumption or otherwise, the sufficient existence of the other element or elements; nor can a claim be sanctioned by a favorable decision as to the Damage element without an assumption as to the existence of the other two.

Under the Damage element, of course, are to be considered

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[1] The language in which Mr. Justice Holmes, in the above mentioned article, seems to show a belief in the propriety of this tripartite division is as follows, the passages being somewhat curtailed: —

(1) "I should sum up the first part of the theory in a few words, as follows. Actions of tort are brought for temporal damage. The law recognizes temporal damage as an evil which its object is to prevent or to redress, so far as is consistent with paramount considerations to be mentioned." (2) "When it is shown that the defendant's act has had temporal damage to the plaintiff for its consequence, the next question is whether that consequence was one which the defendant might have foreseen." (3) "The first [next] question which presents itself is why the defendant is not liable without going further. The answer is suggested by the commonplace, that the intentional infliction of temporal damage, as the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause. . . . There are various justifications. In these instances, the justification is that the defendant is privileged knowingly to inflict the damage complained of."

physical injuries, — what sort of physical or corporal harm may be the subject of a claim. Mere touching of the person may be, while mere touching of personal property once was not. Physical illness of course is. Whether nervous derangement may be, when not brought about through corporal violence, and whether mere fright, with or without corporal violence, may be, is still the subject of discussion. Forms of annoyance, such as disagreeable odors, sights, and sounds, are usually said to be the subject of recovery only in connection with the ownership of real property. There must in all such cases be a degree of inconvenience worth taking systematic notice of. The content of the right to land is also here concerned, including the right against mere intrusion upon the air space, against the cutting off of surface or subterranean water, etc. The nature of the harm known as Conversion must also be treated here. The social relations must be enumerated with which interference is forbidden, and the words known as Libel and the words deemed slanderous *per se* are to be discussed. The facts vesting the rights of patent and copyright, and the matters as to which we have a "right to privacy," and several other modes of harm, involve also some statement of the Damage element.

A good illustration of the necessity for distinguishing between the points of view of the Primary and the Secondary limitations is found in the current discussion of the right to recover for nervous illness, or for mere terror (without illness) caused without corporal violence. From the former point of view the question is whether such harm may be the subject of recovery at all; whether the elusive or temporary character of the harm makes it difficult or not worth while to consider it; whether the opportunity for simulation of illness, or for aggravation of it by the general effect of the imagination or by the particular weaknesses of individuals, does not warn us to be cautious in sanctioning such claims. It is apparent that from this point of view the result might be one for cases of positive nervous derangement, and another for mere temporary fright. But, assuming that such harm may be the subject of a recovery, we have still to consider each case from the point of view of the Responsibility element, *i. e.* to say whether this particular defendant should be made responsible for this particular injury under the circumstances (*e. g.* whether he was negligent or not); and it is apparent that we may still from this point of view deny the present plaintiff's right to recover against the present

defendant. We sometimes find cases indiscriminately marshalled by a writer as "for recovery" or "against recovery" in such cases, as if but a single question were involved. Yet the courts constantly do consider these different points of view. In *Victorian R. Com'rs* v. *Coultas* (13 App. Cas. 222), for instance, the court said: —

(1) "Damages [*sic*? damage] arising from mere sudden terror . . . occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which in the ordinary course of things would flow from the negligence of the gatekeeper." (2) "If it were held that they can, . . . the difficulty . . . of determining whether they [the injuries] were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims."

Here are both points of view; and on both the plaintiff loses. Again, in *Phillips* v. *Dickerson* (85 Ill. 11), the court assumes without question that the sort of injury is a proper subject for recovery, and confines itself to the question of the Secondary limitations,

"Whether such a result was such a natural and proximate consequence of defendant's conduct as to make him liable therefor,"

and here also finds for the defendant. No discussion of the subject can be of value unless the two elements involved in the cases are carefully distinguished.

II. *The Responsibility Element.* — Assuming that the kinds of harm to be avoided or to be protected against have been determined, we have next to consider those limitations of the nexus which determine the nature of the Responsibility element, by defining what connection must exist between the obligor and the harm done, in order to bring him within the scope of the nexus. The question is, in a concrete case of the specified harm, what person, if any, shall be looked to as bound to bear legal responsibility for it.

This is not the place to attempt to define the order and nature of the topics that belong under his head. The doctrine of "acting at peril," the phrasing and application of the tests of "proximate cause," "reasonable and probable consequences," — these, with their attendant refinements and exceptions, form the substance of the general topic. But the important circumstance to call attention to is that this topic has an application in the domain

of each one of the common so-called Torts, — conversion, defamation, loss of service, etc., — no less than in case and trespass. It has been customary to treat the subject of Negligence as if it were a specific injury by itself, instead of merely a question of Responsibility liable to arise in connection with various kinds of harm; but this obscures the true situation. Speaking roughly, a man may be made responsible for a given harm by initiatory action of one of three sorts: by acting (1) designedly, with reference to the harm; (2) negligently, with reference to it; (3) at peril, in putting his hand to some nearly related deed or some unlawful act. A part of the law is occupied with determining whether or not this last and strictest standard shall be applied; and when it is, no resort is needed to the second standard, negligence. Thus it happens that, as almost all direct dealing with personal property is done at peril, the question of negligence (or of knowledge) seldom arises in that connection. Yet it may arise; [1] and thus, even though the treatment of the Responsibility element — mainly negligence and acting at peril — under the head of Conversion is trifling in comparison with its place in injuries covered by trespass and trespass on the case, still it has its rightful place there as elsewhere.

Take, again, Libel. Two cases of recent occurrence will illustrate the part played by the Responsibility element. (1) The Trustees of the British Museum placed in the Library a book containing matter assumed to be libellous; the question arises whether they are responsible for its publication (in the technical sense) without knowledge of the presence of the libellous passage (*i. e.* whether they acted at peril) or are to be judged by some test of due care. (2) In Chicago, a young priest, Father Sherman, delivered a lecture, and in handing to the reporters his manuscript gave to them inadvertently a portion, not orally delivered, containing passages which we may assume to have been libellous. The question arises whether he acted at peril in writing and carrying about this libel, or is to be judged only by the test of due care. Take, also, loss of service and analogous injuries. The question is constantly likely to arise whether the consequences of certain conduct were such as a person of ordinary prudence ought to have foreseen. In *Vicars* v. *Wilcocks*,[2] Lord ELLENBOROUGH laid down a rule that special damage "must be the legal and natural conse-

[1] *Wellington* v. *Wentworth*, 8 Metc. 548; *Nelson* v. *Whetmore*, 1 Rich. 318.

[2] 8 East, 1.

quence of the words spoken"; and afterwards in *Lynch* v. *Knight*,[1] this phrasing was doubted by Lord WENSLEYDALE, who preferred to say that "the consequence must be such as . . . might fairly and reasonably have been anticipated and feared would follow from the speaking the words." Here we have the same sort of question that arises so commonly for injuries to the person and the property.

The Responsibility element, then, in these and in other classes of injuries, has a real place, — greater or less, to be sure, in different instances, but scientifically never to be ignored. Responsibility must be discussed as a generic idea, and with reference to the various harms, and must be thus discussed just as well as the nature and limits of the harm itself.

III. *The Excuse or Justification Element.* — Assuming that the various sorts of harm have been specified, and that the conditions and tests of Responsibility for them have been determined, the general limitations under which the nexus exists still call for treatment. Perhaps the simplest illustration, if any is needed, is the excuse of Self-defence. Here it is conceded that a harm has been done, otherwise the subject of recovery, and that a definite person is responsible for it; nevertheless no legal claim exists, because social experience prescribes limits to the nexus, and one of those limits is found in the circumstances briefly expressed in the term "self-defence." Here, again, it is impossible now to attempt an analysis of the various kinds of limitations. Only two or three suggestions can be made.

1. As a rule certain principles of pleading are based on the distinction between this element and the first and second, throwing on the defendant the business of making out the existence and the application of these limitations. For instance, justifications for a battery and privileges for defamation are left to the defendant to urge. Sometimes, however, the principles of pleading cannot be relied upon to show in this way the line of distinction. For instance, in actions for malicious prosecution, these tertiary limitations vindicate or exempt the defendant, if he brought the suit upon reasonable or probable ground and without malice; nevertheless, it is the plaintiff who is required to show that this reason-

[1] 9 H. L. C. 577. So also *Allsop* v. *Allsop*, 5 H. & N. 534, "damages . . . that do not fairly and naturally result"; *Davies* v. *Solomon*, L. R. 9 Q. B. 112, "reasonably and naturally be expected to follow."

able or probable ground did not exist, — a sensible requirement which we must not allow to obscure the true nature of this element.

2. The rejection or acceptance of the doctrine of *Fletcher* v. *Rylands* — the question whether the test of acting at peril or of due care under the circumstances shall be applied, a question of Responsibility — is sometimes confounded with the question whether one who has knowingly inflicted and continues to inflict a conceded harm is excusable because he is conducting his business in an ordinary and otherwise fair and reasonable manner. Thus, the question whether an electric-trolley railway is liable for electric interference with telephone wires is in part a question whether one party's convenience shall be subjected to another's, — a pure matter of justification or excuse, like the claim of a land-owner to divert or flow back surface water by improvements on his land, or the claim of a manufacturer to diffuse smoke or cause vibration with impunity. Yet the two questions have by no means been kept separate in current discussion.

3. Another application of the above distinction, similar but of larger moment, has been made by Mr. Justice HOLMES in this REVIEW in the article already referred to. He points out that the question of Malice, in connection with boycotts and similar interference with social relations, is not usually one of Responsibility, *i. e.* of the Secondary limitations, but of Excuse, *i. e.* of the Tertiary limitations. We have the case of an inquiry conceded to be a harm and of a party conceded to be the source of it, *i. e.* we have the Damage and the Responsibility elements satisfied; the problem is how to mark off the line of policy so as to determine where this harm may be inflicted with impunity. It is conceded that there are certain circumstances about which there is no doubt, *i. e.* the nexus or right-and-duty extends to cases where fraud, or defamation, or violence is employed, and it does not extend to cases where mere peaceable persuasion not amounting to coercion, and not effected by combination, is the means used. In the debatable ground, one tendency of opinion is to draw the line according as the interference is accompanied or not by malice, *i. e.* (perhaps) is gratuitous and uncalled for by personal needs. Whether this opinion be the best or not, Mr. Justice HOLMES has demonstrated that we have in it, none the less, merely another form of the Tertiary limitation, *i. e.* of a doctrine of Excuse, independent of any doctrine of Responsibility, — a demonstration highly important to the scientific discussion of the subject.

One or two general implications of the recognition of this tripartite division of Tort may now be pointed out.

1. It calls to our attention the necessity, every day drawing nearer, of adjusting the treatment of our substantive law to the abolition, already largely accomplished, of the forms of action and classes of writs in Tort. As regards the distinction between Case and Trespass, there are of course two or three important marks left by it on the substantive law; *e. g.* the principle (justifiable, probably, on the highest grounds) that, of injuries to the person and to property, a mere touching is actionable if produced directly by the defendant, but not actionable if produced indirectly; the doctrine (not positively established and probably not sound in principle) that the causing of terror at physical danger is actionable when occasioned directly, but not actionable when occasioned indirectly. But the time must come when the sorts of actionable injuries will be classed according to an analysis of the essential qualities of the injuries, not the kind of writ employed by the clerks of the Chancery nor the analogies peculiar to a primitive legal condition; a time when further development can take place along these natural lines of classification and in view of the policy that may be appropriate to each situation. The recognition of the common Damage element in all Torts, and its separate treatment, will do much towards this end, — in fact, necessarily involves it as an ultimate consequence. By this it is not meant to advocate a slighting of the forms of action and their historical development, either in treatises or in education. For the present generation at least this would be impossible, as well as unpractical in the highest degree. But there is no reason why we may not, so far as may be, recognize legal realities and put ourselves in the path of more scientific treatment.

2. A more important consequence of the recognition of the tripartite division is the helpful results to be reached by studying the different solutions of the same problems and the applications of the same principles in different torts. Clearer understanding of a general principle and its differing aspects in application, keener appreciation of its worth or perhaps of its incongruities, greater readiness for new developments already pressing upon us, — these are the benefits of such a recognition. It is perhaps in the Secondary limitations — the Responsibility element — that the most interesting opportunity offers; and yet in the Tertiary limitations it is impossible to expect any general analysis or scientific treatment of the various kinds of Excuses or Justifications without first recognizing

the common element and differentiating its field from the others. Of course more writers than one have recognized the propriety of treating "Justifications" under one head; but they have regarded them as more or less appurtenant to specific injuries, instead of looking for whatever common element there might be and analyzing them with reference to each other as well as to the different injuries associated with them. The article by Mr. Justice HOLMES suggests the practical usefulness of work in this direction.

It has not been possible in the allotted space to explain difficult points, or to anticipate questions and criticisms naturally raised by the subject. What has been written will serve, perhaps, as a suggestion for those who have come to believe that there is still room for a theory of the law of Torts which shall, in a greater degree than now, be built up inductively from the cases themselves and yet bear a scientific form.

No opinion is expressed, it should be added, as to whether it is possible or desirable to teach the law of Torts to-day according to the above grouping.

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